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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

RUST LAND AND LUMBER COMPANY
Plaintiff in Error

v. No.....

ED JACKSON ET AL,
Defendants in Error.

SUPPLEMENTAL BRIEF UPON MOTION TO DISMISS OR AFFIRM, AND BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

The motion to dismiss or affirm was continued to the merits and is renewed.

The issues made are apparent in the briefs submitted to the state court appended, as appendix I, duly certified. The points made for defendants in error, appellee below, are respectfully relied upon and are not inserted again, to save prolixity, quotations alone being omitted.

The question was as to the ownership of timber cut by defendants in error at the places shown upon the plat. Lots 1 to 9, inclusive, Section 11, Township 28, Range 5, W., Coahoma County, belonging to the vendors of defendants in error, Sections 22 and 23, in T. 4, R. 4, E, Phillips

County, Ark. (R. 7) to plaintiff in error; containing 56.53 acres and 12.33 acres, respectively (R. Plat annexed.) If the lands from which this timber was cut were platted, as a part of the State of Arkansas and not as a part of the State of Mississippi, it would be located in approximately the North West quarter, Section 28, and South West Quarter, Section 21, T. 4, R. 4 E., considerably over a mile from the nearest point admitted by the record to belong to the plaintiff in error (R. Plat). The admission of this title does not cover **accretions**, but merely the sections. (R. 7).

We differ with counsel fundamentally in his statement of the controversy.

The circuit court shifted the burden of proof from the defendant in error to the plaintiff in error, because of its thoroughly reprehensible acts, wherein, after discovering that these ignorant negroes paid for the timber in question, plaintiff in error brought into Mississippi, an officer of Arkansas, and by force took from them, that upon which they had labored for weeks, and for which they had paid full value.

The land wherefrom the timber was cut is situated partly in what was surveyed as a part of lot 1, Section 11, T. 28, R. 5 W., in the survey in Mississippi, in 1833, by the Government, and partly what was then surveyed as a part of the bottom of the Mississippi River, but which constituted under the Mississippi decision a portion of the riparian owners' rights. In 1817, when Arkansas was surveyed, there was shown to be in the river, off of Secions 22 and 23, a large island; the history whereof does not anywhere appear herein, that is to say, whether or not the thread of the stream did run or not run between the Arkansas side and this island between 1763 and 1817; very certainly, the steamboats pursuing the channel of navigation never went between the Mississippi shore and this island, because so to do, would have entailed a detour of a goodly number of miles.

The avulsion occured in 1848, and thereafter, just as in the Centennial cut off cases, the whole channel proceeded thereon to dry up, and who owns a portion of this timber thereon is the question.

The writ of replevin issued January 22nd, 1913, (Tr. 2), the timber was taken by plaintiff in error, January 21st. The writ was not executed until February 8th, February 10th a forthcoming bond was given by the plaintiff in error with the United States Fidelity & Guaranty Company, as surety, (R. 13), under which possession of the logs was taken by plaintiff in error, who has since converted them by sale. (R. 53.)

The declaration is in the statutory form (R. 4), and the plea is that of the general issue.

In order to save time, an agreement as to title was made, under which it was stipulated that defendants in error owned lots 1 to 9 inclusive, section 11, T. 28, R. 5, while plaintiff in error was admitted to own Sections 22 and 23, T. 4, R. 4 E. in Phillips County.

Zanders Parker, defendant in error, stated that the logs were cut between the Levee (Note the mis-spelling through the record of "levee" as "levy"), and Dustin Pond, under a written contract executed by Anderson, Jackson and Williams who owned the land.

"Q. Now on this land, how long have you been knowing this land on which you cut this timber?

"A. Seventeen years.

"Q. Who has been in actual occupation of that land during all of the time claiming it as theirs?

"A. Same parties claiming it now.

* * * * * *

"Q. What, if any, dispute, about it did you ever hear?

"A. No, sir, none at all." (R. 8.)

Defendants in error were engaged in cutting timber nearly three weeks, and at the time of the coming of the sheriff, were on the Mississippi side of the Levee.

"Q. Tell what he told you then?

"A. He came and brought warrants from Phillips County, Arkansas, and when he came, he told us that if we would give the timber up, or else come on with them; of course when he came and brought the high sheriff, rather than go with them, they taken it away from us. (T. 9.)

* * * * * *

"Q. In what way did they take it from you, by force or not?

"A. By force, we wasn't willing to give it up; come there with the high sheriff from Phillips County; we were satisfied we were right, but when the high sheriff come, couldn't help it, said it would be incompelled to give it up when the high sheriff come, he come and took it away from us." (R. 9.)

Isom White stated that the timber cut was pointed out to them by its owners. (R. 17.)

"Q. What, if any, acts of possession, Isom, did Charley McGhee, King and Anderson, and Ellen Jackson and Joe Williams, the owners in Section 11, with whom you had a contract to cut this timber, exercise over this land where you cut this timber?

"A. They had claimed it for twelve years to my knowledge.

"Q. What had they done there, if anything?

"A. Yes, sir, got them some fire wood off of there." * * * And had sold some of the timber to a man named Hull. (R. 18.)

This timber cost defendants in error $3.50 per thousand feet outside of their labor. (R. 19.)

One defendant in error, detailed the conversation thus:

"Q. Did you turn it over to them willingly?

"A. No, sir, I didn't turn it over to them willingly; * * by me being a negro man, I just give down, had to give down * * I pleaded to Lawyer Fitzgerald for relief." (R. 20.)

The owners have been living right across the lake from this land for 22 years to my knowledge. (R. 21.)

Charley McGhee, one of the owners, testified that all of the land on the Mississippi side of the levee was in cultivation, and that he and "Sister" Jackson told the defendants in error where to cut, and that he had his lines run out over there by a surveyor about twelve years ago. (R. 25.) He claimed ownership by reason of "cutting it and using it from over there." He sold some of this timber to Mr. Leavenworth, seven or eight years ago, possibly longer. He sold some to Mr. Hull ten or twelve years ago. (R. 26.)

Mr. Hull once surveyed it for him and showed him where his lines were and ran his line over near the bank of Dustin Pond. (R. 27.)

The remarkable development is this, **on cross-examination:**

"Q. You are not old enough to have been living there when the cut off was made in the river in '48, are you?

"A. No, sir, I wasn't here in '48, I was here in 1857 when the water come in July. (R. 28.)

"Q. You don't know how that land formed over there north of that lake do you?

"A. I know a portion of it when the cut off was made, where that cut off was made in 1857, you could

go across there, there was a little lake across there, just kind of a wash, and the water come in '57, and washed, cleaned out a lake there.

"Q. This lake was there at that time?

"A. It was a little small stream, a little small, a little kind of a flat there.

"Q. But the main body of water was there, wasn't it?

"A. After the high water come in?

"Q. Real swift current was there, wasn't it?

"A. No, sir. (R. 29.)

Substantiating this is the evidence of old Harry Malone. (R. 155.)

Plaintiff in error wholly failed to prove the location of (a) the **high water mark on the Arkansas side at the time of the avulsion,** (b) the **location of the thread of the stream or navigable channel,** as existing at the date, and went to trial upon the facts, **claiming ownership under an admission of title to Sections 22 and 23,** of Township 4, Range 4.

Divers instructions were had (R. 160-161), a verdict was rendered in favor of defendants in error and judgment had thereon. (R. 164.)

Rust Land and Lumber Company, made a motion for a new trial (R. 164), wherein the surety on the replevin bond did not join, which motion (R. 165) was promptly overruled, and, a bond was given by the Rust Land & Lumber Company, as principal, with the United Casualty and Surety Company, as surety, which operated, on appeal, to the State Supreme Court.

The errors assigned are shown (R. 167-8). Counsel for plaintiff in error made a motion to continue the cause on March 4th, 1916, (R. 178) which motion was sustained

by reason of there not being any contest made as no notice was received; immediatley upon getting notice, a motion was made (R. 179) to set aside the continuance, which was granted. The case then came on for regular hearing and was affirmed December 23, 1916 (R. 171), whereupon, there was a motion for a re-hearing (R. 181), which was denied January 8th, 1917 (R. 179), and, thereupon, a **writ of error** was sued out to this court by the Rust Land & Lumber Company alone; the judgment in the supreme court being against the Rust Land & Lumber Company and the United Casualty & Surety Co. (R. 171.)

SUPPLEMENTAL BRIEF ON MOTION TO DISMISS OR AFFIRM.

I.

A writ of error not appropriate means for transferring jurisdiction.

Conceding a federal question, nevertheless a writ of error cannot be used to reverse the final judgment rendered December 23, 1916, by the Supreme Court of Mississippi; under the amendment of Section 237 Judicial Code, certiorari became the appropriate remedy.

In **Philadelphia & Reading Coal & Iron Company v. Gilbert,** 245 U. S. 162, the Court said:

> "Under Section 237 of the Judicial Code, as amended September 6, 1916, (chap. 448, 39 Stat. at L. 726 (Comp. Stat. 1916, Section 1914), a final judgment or decree of a state court of last resort in a suit 'where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of

the United States, and the decision is in favor of their validity,' may be reviewed in this court upon writ of error; but, if the suit be one 'where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority,' the judgment or decree can be reviewed in this court only upon a writ of certiorari. The difference between the two modes of securing a review, as contemplated by the statute, lies in the fact that a writ of error is granted as of right, while a writ of certiorari is granted or refused, in the exercise of a sound discretion."

Again, in **Ireland v. Woods**, 246 U. S.——this Court said:

"A motion to dismiss is made, the grounds of it being: (1) The judgment of the court of appeals is reviewable, if at all, only by certiorari. (2) It is not reviewable at all because, under the limitation of the jurisdiction of the court of appeals, it had no power to review or decide the question whether there was any evidence to show that Ireland was a fugitive from justice, and that the court of appeals must be assumed not to have

passed upon or to have decided the question whether Ireland was a fugitive from justice. Whether the assumption is justified or not we do not consider, on account of the view we entertain of the first ground of the motion, to which we immediately pass. To sustain it counsel adduces Section 237 of the Judicial Code (36 Stat. at L. 1156, Chap. 231) as amended September 6, 1916, (Chap. 448, 39 Stat. at L., 726, Comp. Stat. 1916, Section 1214). It provides in what cases and how there can be a review of a judgment or decree of a state court by this court. It reads as follows: 'A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.'

"When, however, the conditions are reverse, that is, when state court judgments affirm the national powers against a contention of their invalidity, or sustain the validity of the state authority against an attack based on Federal grounds, there can be review only by certiorari. And the same manner of review is prescribed where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is either in favor of or against the claim set up.

"The difference between the remedies is that one (writ of error) is allowed as of right where, upon examination, it appears that the case is of the class designated in the statute, and that the Federal question presented is real and substantial

and an open one in this court, while the other (certiorari) is granted or refused in the exercise of the court's discretion.

"Coming, then, to consider what was involved in the decision of the courts below, it is manifest that the validity of no national enactment or authority was drawn in question, nor, in the meaning of the section, the validity of a statute or authority of the state. There is no doubt of the right of the governor of New Jersey to have demanded of the governor of New York the extradition of Ireland, nor of the governor of the latter state to have complied. Indeed, it was the duty of both so to act if the case justified it, and whether there was such justification was the only inquiry and decision of the courts below.

"We said in United States ex rel. Champion Lumber Co. v. Fisher, 227 U. S. 445, 57 L. Ed. 591, 594, 33 Sup. Ct. Rep. 329, that the validity of a statute of the United States or an authority exercised thereunder is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry. A dispute of the facts upon which the authority was exercised is not a dispute of its validity. See also United States ex rel. Foreman v. Meyer, 227 U. S. 452, 57 L. ed. 594, 33 Sup. Ct. Rep. 331. If there be no dispute about the facts, Hyatt v. People, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am, Crim. Rep. 311, might apply. And necessarily the same principle and comment are applicable when there is drawn in question the validity of a statute of or authority exercised under a state."

Again, in **Stadleman v. Miner**, 246, U. S. ————, there was reinstated a cause wherein there had been an inadvertent omission to notice the opinion by the State Supreme Court of a Federal question, and yet in the same

case, 246 U. S., upon April 15th, 1918, this Court said:

> "At the first argument of the case in the supreme court of Oregon, plaintiffs contended that to sustain the validity of the sale under the order of the county court would deprive them of their right to due process of law guaranteed by the 14th Amendment (see memorandum opinion of this court, 246 U. S. ———, ante, 395, 38 Sup. Ct. Rep. ——, March 18, 1918). Upon this contention the case was brought here under Section 237 of the Judicial Code, (36 Stat. at L. 1156, Comp. Stat. 1916, Section 1214. But under that section as amended by Act of Sept. 6, 1916, chap. 448, 39 Stat. at L. 726, Comp. Stat. 1916, Section 1207, a final decree of a state court of last resort can be reviewed here on writ of error only in a suit 'where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.' The judgment here involved was entered after the Act of September, 1916, took effect. There was not drawn in question the validity of any treaty or statute. And challenging the power of the court to proceed to a decision did not draw in question the validity of any authority exercised under the state. Philadelphia & R. Coal & I. Co. v. Gilbert, 245 U. S., 162 ante, 68, 38 Sup. Ct. Rep. 58; Ireland v. Woods, 246 U. S.——, ante, 392, 38 Sup. Ct. Rep. 319, March 18, 1918. The writ of error is therefore dismissed."

Still later in **No. Pac. R. R. Co. v. Solum,**———U. S.

———U. S. Adv. Op. (June 10, 1918), this Court said:

"The judgments entered were upon demurrers to the answers. That in number 205 was entered May 28, 1916; that in number 206 on May 23, 1916; that in number 526 on May 2, 1917. 133 Minn. 93, 157 N. W. 996; 133 Minn. 461, 157 N. W. 996; 136 Minn. 468, 162 N. W. 1087. In each case it is assigned as error that the state court held that the cause of action therein is not affected by the Federal statute regulating interstate commerce; and also that the state court assumed jurisdiction in advance of a determination by the Interstate Commerce Commission as to whether the practice of the Northern Pacific Railway, in sending via its interstate route all shipments of the character involved in these cases, was reasonable. In the third case the additional error is assigned that the court held that the intrastate rate should be applied, although the Interstate Commerce Commission had found that the practice of routing outbound shipments from Duluth via the interstate route was proper and reasonable. The objection that the court lacked jurisdiction to entertain the proceeding was not made in the answers in the trial court; but it was insisted upon before the supreme court of Minnesota; was considered and overruled by that court (133 Minn., 93, 97); and is available here. In numbers 205 and 206 judgment was entered before the Act of September 6, 1916. A Federal question is involved; and the cases are properly here under Section 237 of the Judicial Code (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1916, Section 1214). In number 526 the judgment was entered after the Act of September 6, 1916, chap. 448, 39 Stat. at L. 726, Comp. Stat. 1916, Section 1207 took effect. In that case there was not drawn in question the validity of a statute or treaty nor the validity of any authority exercised under the

state. Philadelphia & R. Coal & I. Co. v. Gilbert, 245 U. S., 162, ante, 68, 38 Sup. Ct. Rep. 58; Ireland v. Woods, 246 U. S. ——, ante, 392, 38 Sup. Ct. Rep. 319; Stadelman v. Miner, 246 U. S. ——, ante, 430, Sup. Ct. Rep. 359. The writ of error in number 526 must therefore be dismissed, although the defendant in error has not objected to the jurisdiction of this court."

In the instant case there is not drawn in question the validity of a treaty or a statute of the United States, or of any authority exercised under the United States; nor is there any question made of the validity of any statute or an authority exercised under any state on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and it is only in these two classes of cases that a writ of error may be had as of right and then only when the first is denied and the second is granted.

Note that the validity must be "drawn in question," not merely the construction, and that the validity of no treaty or statute or authority is drawn in question is demonstrable by the statement of the case.

U. S. ex rel. v. Fisher, 227 U. S. 445. See, also **Muse v. Arlington Hotel Co.**, 168 U. S., 430; **Pettit v. Walsh,** 184 U. S., 205.

By no stretch of the imagination in the instant case could it be said that this case came within Section 237 of the Judicial Code as amended so as to grant a writ of error.

To exclude a conclusion that such a course might occur, this Court in **Cissna v. Tennessee**, 246 U. S., 289, made express reference to the fact that the writ of error was granted "before the amendment of September 6, 1916."

Plaintiff in error claims "a title, right, privilege, and

(or) immunity'' under the Constitution and treaties of the United States, and when he does, certiorari is expressly made the sole means under which the decision may be reviewed. Even when the question is not raised the court **sua sponte** takes notice of it and dismisses the writ of error.

II.

Plaintiff in Error failed to show the existence of a federal question adversely determined.

The decision of the Supreme Court of Mississippi did not deny the Federal right of the plaintiff in error, by overruling its motion that this cause be continued to await the determination of the suit between the State of Mississippi and the State of Arkansas, then properly in this Court, to settle the boundary line between the two states at the point involved in this cause, primarily, or in any other manner.

We refer to the original brief upon this motion as conclusive—Plaintiff in error fails to show any right below **high water mark** in Arkansas, and the title between that water mark and the thread of the stream being in the State, the determination of original number six in this Court, is immaterial. Plaintiff in error in the circuit court of Coahoma county, claimed title, not under its judicial knowledge as to the location of the line in question, but under certain evidence, introduced in that court, by the plaintiff in error, which evidence did not include any reference to any of the treaties which were construed by this court in Arkansas v. Tennessee, supra.

There plaintiff in error made its right of recovery dependent upon the principles of law stated by it in its instructions. By the first instruction, the court told the jury, that if they believed the avulsion occurred, and that certain other facts existed, then they would, under the evidence in this record, and not under any treaty, or decision of this Court, but simply and solely upon the

evidence introduced, find a verdict for the defendant.

The defendant, plaintiff in error, did not seek to raise a Federal question; did not seek to try this cause out upon the ground that it contained a Federal question, which would, of necessity, have to be decided ultimately by this court; but what plaintiff in error did do was to submit to the court of Coahoma County, the question of its rights, under the record, as made in that court; and what was determined on that record is **res adjudicata** of what was there decided, and of that, and nothing more.

This court does not sit, as an ultimate arbiter to compel litigants to choose how they will conduct their controversies. There is, under the law of Mississippi, a well defined principle, that where parties elect to adopt a principle as a rule of law, for the trial of their issues, and to make their issues determinable by the rule so thus adopted, neither party can complain of the binding effect of such rule.

Van Oss v. Insurance Company, 63 Miss., **431. Wilson v. Zook**, 69 Miss., **Clisby v. M. & N. O. Ry. Co.**, 78 Miss., 948; **Hitt v. Terry**, 92 Miss., 672.

We frankly state that, ordinarily, the existence of a Federal question is determined, not by the way in which it is decided, but by the fact that it was decided; but, in the instant case, there was no attempt to have a Federal question raised, and no dispute as to any Federal question; but, upon the evidence in this case, each party sought a verdict on such evidence, and not upon the treaties, and not upon the judicial knowledge of the court, without any effort at continuance, then we say that there is an estoppel—a local question.

Counsel, with deference, is in error, when he states that the trial court took judicial knowledge of the Federal nature of the boundary line. The lower court submitted many questions of fact to the jury for decision, and, in

Mississippi, it is expressly provided by Section 793, Code 1906,

"The Judge in any cause, civil or criminal, shall not sum up or comment on the testimony, or charge the jury as to the weight of the evidence, but, at the request of either party, shall instruct the jury upon the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement."

And plaintiff in error did not ask a judicial definition under the judicial knowledge of the court. So every instruction was asked by plaintiff in error as a predicate for a verdict in its behalf; the predicate therefor, a belief from the evidence in this case; and in no part of the evidence in this cause was there ever any reference to any Federal question whatsoever.

Jayne v. Nash, 66 So., 813, in no way impairs **Thomas v. Wyatt**, 17 Miss., 309; on the contrary, it directly reaffirms the decision and overturns counsel's contention. The judgment in **Jayne v. Nash** was against **both principal and surety**, and thereby, the surety became, in the circuit court, a party to the record; as such, the judgment was against him; and the Court held, very properly, that being a party to the record, he could not be a surety upon the appeal bond to the supreme court. Under the statute of Mississippi, any person may appeal; Section 33, Code 1906, whether principal or surety. Under Section 43, Code 1906, it is expressly provided how the proceedings shall be conducted in the supreme court, and how any party who fails to obey the summons thereunder issued, shall not, thereafter, have a right of appeal, and "the judgment or decree of the court below shall remain in force against them." To the principal or surety the statute prescribed the effect where there is a failure to join in the appeal, and the result is not left to judicial construction.

True the supreme court of Mississippi has said that a surety on a bond in the trial court is not a necessary party to an appeal but only because any party may, under the statute, appeal irrespective of the act of any other party, but the supreme court of Mississippi expressly held, in the Nash case:

> "The judgment appealed from is **a joint judgment** against appellant and the sureties on his appeal bond, and, by executing this bond, these parties simply obtained a supercedeas of the judgment against them, so that, in truth and in fact, all of them are principals and the bond contains no real sureties." (Italics ours.)

The decision being that under the Mississippi practice there is a joint judgment against them, they would be necessary parties to a writ of error proceeding, were there no statutory amendment, as is now the case in Mississippi. Appeals may be taken by any party, writs of error being expressly abolished. Code Sec. 32. The problem presented is therefore under this decision, a joint judgment against the Rust Land & Lumber Company and the United States Fidelity & Guaranty Company, in the circuit court of Coahoma County, wherefrom, under the local practice, the Rust Land & Lumber Company has alone appealed, whereby, under Section 43, the judgment against the United States Fidelity & Guaranty Company has become final; being a necessary party to a review of the judgment in this court, can plaintiff in error, without the presence of the United States Fidelity & Guaranty Company prosecute this writ of error?

It will be perceived that, as authority, the Nash case refers to 2 Cyc. 831, which shows a contrariety of judicial opinion and will explain the cases from Texas and Florida. The Federal cases rest upon the admiralty practice, and, with deference, are not pertinent.

Estes v. Trabue, 128 U. S., 229, is a Mississippi de-

cision, and, directly denies the contention of plaintiff in error, that the judgment here is severable and separate; and, further, directly holds that the sureties upon the bonds are essential parties, this Court saying:

> "But there is another difficulty in the present case, which cannot be reached by an amendment in or by this Court, under Section 1005. The judgment is distinctly one against the claimants and C. F. Robinson and W. J. Dillard, their sureties on their forthcoming bond, jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as a separate judgment against the claimants, and another separate judgment against the sureties, or, as containing a judgment against the sureties on, and enforceable only, on a failure to recover the amount from the claimants; an execution is awarded against all of the parties jointly."

Which is the identical case here and is conclusive against the plaintiff in error, both upon the necessity of the sureties being present, and upon the proposition that this is a severable judgment. Judgments in Mississippi are entireties.

Comenitz v. Bank, 85 Miss., 665.

The other party against whom judgment was rendered in the State Supreme Court is not before this Court and hence for the reasons assigned in the original brief upon this motion it should be sustained.

POINTS ON THE MERITS.

I.

Plaintiff in error failed to prove title below the high water mark on the Arkansas side.

II.

Plaintiff in error failed to prove the locus of the thread of the stream at the time of the avulsion.

ARGUMENT.

I.

Plaintiff in error failed to prove title below high water mark on Arkansas side.

The possession having been forcibly taken by plaintiff in error the burden of proving title rested on it. The several states adjudicate, as local questions, the ownership of beds of navigable streams within their boundaries. **Archer v. Greenville,** 233 U. S., 68. **Packer v. Byrd,** 137 U. S., 661. **St. Louis v. Routz,** 138 U. S., 442.

Under the right thus vouchsafed, Arkansas has fixed the termination of private riparian ownership at high water mark.

State v. Parker, 200 S. W., 1014; **Sand Co. v. State,** 192 S. W., 380; **Johnson v. Quarles,** 182 S. W., 283; **Material Co. v. State,** 180 S. W., 219; **Patrick v. Steinkle,** 100 Ark., 36; **Barbaro v. Boyle,** 108 S. W., 379; **R. R. Co. v. Ramsey,** 8 L. R. A., 559.

In **Arkansas v. Tennessee,** 246 U. S., 158, the Court said:

> "Arkansas may limit riparian ownership by the ordinary high water mark (St. Louis I. M. & S. R. Co. v. Ramsey, 53 Ark., 314, 323; Wallace v. Driver, 61 Ark., 429, 435, 436;) and Tennessee, while extending riparian ownership upon navigable streams to ordinary low water mark, and reserving as public the lands constituting the bed below that mark (Elder v. Burrus, 6 Humph., 358, 368; Martin v. Nance, 3 Head, 648, 650; Goodwin Thompson, 15 Lea, 209, 54 Am. Rep. 410), may, in the case of an avulsion followed by a drying up of the old channel of the river, recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion, as she has done in

> State v. Muncie Pulp Co., 119 Tenn., 47, 104 S. W. 437. But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located."

By the record, ownership of plaintiff in error is shown to sections 22 and 23 containin 69.40 acres, and no more.

> "And it is further agreed that the title in fee simple to Section 22 and Section 23, all in Township 4 South, Range 4 East, in Phillips County, Arkansas, is vested in the Rust Land & Lumber Company, defendants in this cause." (R. 7.)

This agreement does not apply to **accretions**; if the land in question were surveyed as a part of Arkansas it would be found, not in Sections 22 and 23, but, on the contrary, in Section 21 and Section 28, to which no title whatever is shown upon the part of plaintiff in error.

A fundamental fact is that, beginning many years ago, and continuing to the present, taxes have been paid by plaintiff in error only upon Sections 22 and 23, aggregating 70 acres, beginning with a value in 1894 (R. 98) at $70, and culminating in 1917 with a value of $275.00.

In the petition for a written opinion, plaintiff in error says that "Horseshoe Island is a tract of approximately three or five thousand acres; worth, with the timber upon it, Fifty Thousand Dollars." (Rec. 172.)

And yet, plaintiff in error is content to pretend to discharge its obligation to the state upon an assessed value of $275.00, and an acreage of 70 acres.

A reference to the briefs in the Supreme Court of Mississippi, Appendix I, demonstrates that this is the point upon which that Court may have decided this case. It called for an explanation upon the part of the plain-

tiff in error, of a delinquency, which counsel for plaintiff in error did not vouchsafe to the state court. Why is plaintiff in error entitled to the protection of the state court for $50,000 worth of property, 5,000 acres in extent, when they pay taxes to the state upon 70 acres, which they have solemnly had assessed at $275.00!

This court, in common with the courts of Mississippi, attaches great importance to the payment of taxes as being an element in the assertion of ownership. **McCaughn v. Young,** 85 Miss., 277, quoting to approve **Holtzman v. Douglass,** 168 U. S. 278. See, also, **Native Lumber Company v. Elmer,** 78 So. 703. This failure in itself was sufficient to decide the case against plaintiff in error.

POINT II.

The plaintiff in error failed to prove the locus of the main navigable channel of the stream at the time of the avudsion.

The burden of proof being upon plaintiff in error, there is, in this record, no evidence whatsoever as to the location of the thread of the Mississippi River, as defined in **Arkansas v. Tennessee,** 246 U. S., 158 at the date of the avulsion. **Cissna v. Tennessee,** 246 U. S., 289; **Arkansas v. Tennessee,** U. S. Advance Opinions (1917), 680.

Plaintiff in error undertook as a matter of fact, to locate this line on the trial, and herein lies one distinction between Cissna v. Tennessee, and the instant case. The State of Tennessee sued Cissna in a court of equity, setting up the ownership of all that portion of the dry land, formerly a part of the bed of the Mississippi River, lying between the low water mark on the Tennessee side and the middle of the river as it flowed prior to the avulsion.

Cissna pleaded, in abatement, that the land described in the bill, was located in Arkansas, and not in Tennessee, and, hence, the court was without jurisdiction. The lower court sustained the plea and ordered the

suit dismissed. Here, no plea in abatement was interposed.

In the Cissna case, the supreme court of Tennessee held that the rule laid down by this court in Iowa v. Illinois, 147 U. S. 1, should **not** be followed, and, thereupon, on remand, the pleadings were amended so as to allow a recovery to the middle of the channel, as it existed in 1823. Here there was no such refusal to follow any decision of this court nor did the state court as above shown pass upon any such question.

The State of Arkansas filed its bill in this Court against the State of Tennessee, to settle the boundary line between these two states. The pendency of that action was brought by Cissna to the attention of the trial court and made the basis of an application for a stay of proceedings until the boundary line between the states should have been fixed by this Court and the fixing of the boundary decided that case but wont decide this one.

This application was overruled and the cause proceeded with in the Cissna case on the merits, which on appeal, was affirmed. Now, this Court took jurisdiction, the decision of the Supreme Court of Tennessee, averse to Cissna involved essentially Federal questions. But in this instant case, there was not drawn in question, any controversy between plaintiff in error and defendant in error, as to the correct decision in Iowa v. Illinois, 147 U. S., 1. The courts are at one upon the law in this aspect. Both the defendant and the plaintiffs, in their instructions did not in any way make an issue upon the difference in the law as laid down in this Court and as adopted in the Cissna case. There is no attempt here to define what channel i. e. the steamboat or that equidistant between the banks was meant in the instructions of either plaintiff or defendant and if the plaintiff in error desired to have this cause determined, by the location of the boundary between Arkansas and Mississippi, by a decision of this Court, it should have objected at the

trial of the cause until the decision in the case of Arkansas v. Mississippi had been handed down.

It is not permissible for a litigant to experiment with the courts; to take a chance of winning, and then when such party loses, to assign, as error, his own act.

In short, the boundary line between Mississippi and Arkansas was at the date of this proceeding, unknown to either plaintiff or defendant, and as shown did not concern either party, as the plaintiff in error has shown no title below highwater mark on the Arkansas shore, and, thereupon, without reference to the determination of any case in this Court, as a question of fact, there was a determination, upon evidence introduced by the respective parties before the Coahoma County Court, as to the ownership of this timber. Plaintiff in error was given this instruction (more favorable than it should have received) thus: "The Court instructs the jury for the defendant that, if they believe, from the evidence, that the body of water shown on the map introduced in evidence in this case and called "Old River" or "Pecan Lake" is between the Mississippi shore and the land on which the timber in controversy in this suit was grown, and that this body of water **was the last channel of the river, as it dried up,** between the Island and the shore of Mississippi, and that the said land on which the said timber was grown is not attached to the Mississippi shore, or any accretions formed or attached thereto, then the Court will find for the defendant." (Italics ours.)

The boundary line was the thread of the navigable channel at the date of the avulsion under the decision of this Court. After that date, the boundary between Arkansas and Mississippi was irretrievably fixed, wherein, consider State of Arkansas v. State of Tennessee, supra, where this Court said:

> "By the avulsion of March 7th, 1876, which resulted in the formation of a new channel, known

as the Centennnial Cut-off, the boundary line between said states was unaffected and remained in the middle of the former main channel of navigation, as above defined. The boundary line between the said states should now be located along that portion of the bed of the said River that was left dry as the result of such avulsion, according to the middle of the main navigable channel, as it existed at the time the current ceased to flow therein, as the result of said avulsion."

This instruction is diametrically opposed to the settled rule in this court. **Cissna v. Tenn.**, 246 U. S., 289; **Arkansas v. Tennessee**, 246 U. S., 158, for, as said therein, "It is settled beyond the possibility of dispute, that, where running streams are the boundaries between states, the same rule applies as between private properties, namely, that when the bed and channel are changed by the natural and gradual process known as erosion and accretions, the boundary follows the varying course of the stream, while, if the stream, from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may have flown therein, and, irrespective of subsequent changes in the new channel." **New Orleans v. United States**, 10 Peters, 662, 717; **Jeffries v. East Omaha Land Co.**, 134 U. S., 178-189; **Nebraska v. Iowa**, 143 U. S., 359, 361, 367, 370; **Missouri v. Nebraska**, 196 U. S., 23, 34, 36.

So, plaintiff in error received an instruction more favorable than it was entitled to receive under the decisions of this Court, and plaintiff in error submitted to the jury of Coahoma County, as a question of fact, upon the evidence then introduced, the proposition as to the title to this timber and lost. There was no definition of the boundary directly or indirectly by the trial court

that in any wise conflicted with any decision of this Court.

Plaintiff in error did not introduce before the jury, any of the treaties in question; did not rely upon the judicial definition by the court of the boundaries, but submitted to the court a question of fact for the jury to determine, **as a question of fact,** upon the evidence which was then before the court—simply that and nothing more.

No effort was at the time made by the plaintiff in error to put before the jury of Coahoma County, anything with reference to what might or might not be decided in this Court. The counsel for plaintiff in error was careful to tell that jury under what circumstances they could find for it. Counsel in the court below did not seek to have the jury pass upon, as a settled fact, that which will be determined by this Court, when the case of Arkansas v. Mississippi is decided. The Supreme Court of the State of Mississippi, thereupon following the decision of Clisby v. M. & O. R. R. Co., 78 Miss., 937, could have af firmed this judgment upon the ground that where there is the trial, and instructions are asked by each party, predicating the law to be the same, thereafter, neither party can assail the rule of law by which the case was tried, irrespective of how erroneous that rule of law may have been. **Van Oss v. Insurance Company,** 63 Miss., 431; **Wilson v. Zook**, 69 Miss., 700; **Hitt v. Terry,** 92 Miss., 672.

The Circuit Court of Coahoma County tried this case as one wherein all the evidence, pro and con, had been introduced. Plaintiff in error did not ask for a continuance upon the ground that the decision made by this Court would be in any way material, and it is not to be tolerated that he should take chances of winning his case upon this evidence before that court, and then, after he has lost trifle with the judiciary, by claiming that the theory upon which that trial was had is erroneous, and that the court **a quo** should take judicial knowledge of a boundary that was subsequently to be established when

by its conduct the determination of its location was not essential. Of course, if plaintiff in error had won this case, and the jury had believed his witnesses, that might have been an end of the controversy. But, when it lost the case, it now seeks to inject therein, as a federal question, that which was not considered by the court below, and to which, **at the proper time,** the plaintiff in error made no reference.

If plaintiff in error desired to rely upon the decision of this Court and the fixation of the boundary by this Court, and as an essential factor in the cause, that the Circuit Court of Coahoma County was compelled to take judicial knowledge of that boundary, then the plaintiff in error should have presented these several things to that court, and not attempted to get a decision from that court upon evidence which has been discredited by a jury.

The location of the meander line of the Mississippi in 1833 is definitely given and the locus in quo wherefrom the timber was cut was in lot 1, section 11, T. 28, S. 5 W.; as the ownership of the riparian owner extended to the thread of the stream. Archer v. Greenville, 233 U. S., 68; and the plaintiff in error having failed in the circuit court of Coahoma County to prove where the thread of the navigable stream was at the time of the avulsion, that court should, as a matter of law, have determined that the presumption was that the line was equidistant between the two visible banks of the Mississippi River. **State v. Keane,** 84 Mo. App. 130.—

> "But the expression that the boundary will remain in the center from bank to bank of the old river bed is correct in all those cases where no showing has been made of where the navigable channel was. For in the absence of proof on that subject, it will be taken to be in the center of the old bed located from bank to bank. Creasy's First Platform on International Law, Sec. 231, Iowa v.

Illinois, supra. But where the old channel is located, as in this case, the presumptions which obtain, in the absence of evidence, gives way."

Iowa v. Illinois, 147 U. S., 1.

There is no proof at the avulsion in 1848, that there was more than one navigable channel, or that the navigable channel varied from the dividing line equidistant from the fixed shores, and the burden of proof being upon plaintiff in error to so establish the existence of such a navigable channel, failing therein, the burden imposed upon it by a wrongful act was not met and judgment went for plaintiffs.

In 1817, an island is shown in the center of the Missippi River and there is no proof that between the date of 1763 and 1817, the navigable channel did not run between this island and Arkansas. If it did, thereby this island became a part of the Mississippi territory, and Mississippi jurisdiction thereafter would not have been lost by the subsequent changing of the channel; if, subsequently, accretions formed therefrom they would be a part of Mississippi territory.

Missouri v. **Kentucky**, 11 Wallace, 395; **Indiana** v. **Kentucky**, 137 U. S., 508.

And plaintiff in error, with this burden of tracing the main navigable stream, by his evidence, wholly failed to connect up the island in question, so as to show that this island was not on the Mississippi side, and that these accretions to the West did not form from this island, and not from the mainland.

The fundamental error running throughout the brief of learned counsel, both in this Court and the Supreme Court of Mississippi, is the failure to note that at the date of the avulsion, the doctrine of accretion ceased to operate; and that after the avulsion occurs, there is a fixed and definite line, which line does not vary, even though

the old river should become dry, as was the case in **Arkansas v. Tennessee,** supra, and that plaintiff in error wholly failed to connect its property up with this line— its ownership stopping at high water mark.

By an avulsion, the boundary line between two states become fixed, there ceases to operate at once, the doctrine of accretion between the sovereignties in question **Arkansas v. Tennessee, supra; Cissna, v. Tennessee, supra; Missouri v. Nebraska, supra; Nebraska v. Iowa,** 143 U. S., 361; **Jeffries v. Land Co.,** 134 U. S., 178.

Counsel cites two cases, **Truly v. Golden,** 117 Mo. 33; **Benechke v. Welch,** 67 S. W. (Mo.) 604; neither of which, in any way, conflicts with anything herein contended for.

Counsel cited, as conclusive, the case of **Nix v. Pfieffer,** 73 Ark., 179; but, in that case, when reported in 83 S. W., it is declared:

> "The river line is a natural boundary, and its gradual advance or retard carries the owner's line with it, except in case of avulsion, or sudden and perceptible change of the water course, in which latter case, the line remains at the old water line and becomes fixed by it, not subject to further change by the caprice of the river."

R. R. Company v. Ramey, 53 Ark., 314; **Wallace v. Driver,** 61 Ark., 429; **St. Louis v. Rutz,** 138 U. S., 226; **Nebraska v. Iowa,** 143, 359.

Furthermore, the bed of the rivers in Arkansas is held by the State in trust for the public.

State v. Parker, 200 S. W. (Ark.) 1014.
Sand Company v. State, 192 S. W. (Ark.) (1917) 380.
Johnson v. Quarles, 182 S. W., 283;
Material Companies v. State, 180 S. W. 219.

Counsel is in error in stating that the abandoned channel did not dry up after the avulsion of 1848.

Charley McGhee testified expressly that it was dry, and that in 1857, when the water came, it was washed out by a break there in the levee.

What the caprices of the Mississippi River are, no living man can tell, and while experts theorized upon the formation, this old negro was upon the ground, and his testimony was brought out by plaintiff in error upon cross-examination without any knowledge, upon the part of the defendant in error as to its existence and he was directly supported thereafter by Harry Malone.

Furthermore, we submit that the decision could be affirmed upon the ground of adverse possession. Our statement was challenged.

It will be seen that the land in question is subject to annual overflow, being between the Mississippi Levee and the Arkansas Levee. It further appears that it is covered with a dense growth of cotton wood trees, and is therefore incapable of actual physical possession.

The rule of law as to adverse possession in Mississippi is found in **McCaughn v. Young,** 85 Miss., 293, and **Elmer v. Native Lumber Co.,** 75 So., 703.

Adopting these decisions as controlling, we have to submit, as evidence of adverse possession, in answer to counsel's challenge, the following:

"Q. Who has been in actual occupation of that land during all of the time claiming it as theirs?

"A. Same parties claiming it now.

"Q. That you bought the timber from?

"A. Yes sir.

"Q. What, if any, dispute about it, did you ever hear?

"A. No, sir, none at all.

"Q. Who claimed to own that land to you there at that time, adversely to the world.

"A. King and Anderson, Ellen Jackson and Joe Williams.

"Q. The parties you bought the timber from?
"A. Yes, sir.

We submit the manner of the taking of the timber from these ignorant negroes by physical force and threats of depotation, unless they at once surrendered claim, is such conduct as would deprive the plaintiff in error, without the clearest proof of actual ownership of any right in the premises.

To think of a Company in this free United States, to take from a helpless and ignorant race, that for which they had paid full value, and upon which they had labored three weeks, under threat that if they did not give it up, they would be taken care of by being incarcerated for exercising the privilege of laboring in their own behalf (R. 8-9), especially so when that Company had not seen fit to have said land assessed for taxes and to pay taxes on it!

The possesion, according to Zanders Parker (R. 8), had continued for 17 years.

It appears that the witnesses for plaintiff in error stated that this timber was surrendered willingly. Thus: "He served the papers on them and told them that they dasen't go over and molest that timber any longer, that I was taking charge of the timber, **and they were satisfied.**"

It appears from the evidence that the very next day, a writ of replevin was issued upon the negroes' complaint.

"Q. Where you cut this timber you had been in notorious, adverse and uninterrupted possession of this land where you cut this timber for about ten years past?

Defendant objects to that, because it is a conclusion.

(The Court): I overrule the objection.

Defendant excepts.

"Q. Who has been in possession of this land?

"A. Charley McGhee and Joe Williams.

"Q. Claiming it as their own?

"A. Yes, sir. (R. 17.)

Which last answer was objected to and sustained.

"Q. What, if any, acts of possession, Isom, did Charley McGhee, King and Anderson and Ellen Jackson and Joe Williams, the owners in Section 11, with whom you had a contract to cut this timber exercise over this land where you cut the timber?

"A. They had claimed it for twelve years to my knowledge.

"Q. What had they done in there, if anything?

"A. Yes, sir, got them some fire wood off of there.

"Q. What else?

"A. That is all.

"Q. Had they sold any timber in there that you know of?

"A. Yes, sir.

"Q. They had sold timber?

"A. Charley McGhee had sold some.

"Q. Who did he sell it to?

"A. Mr. Hull.

"Q. How long ago has that been?

"A. It has been twelve years.

"Q. Has Charley and the rest of them been in possession since then?

"A. Yes, sir. (R. 18).

They have all the land on the South of the Lake in cultivation and reside there, so that a possession of a part of the locus in quo, under claim of title, would operate as an adverse possession of the entire tract. (R. 21).

Charley McGhee testified that the land in question had been surveyed by Mr. Houston before he bought it and that the lines ran out to near what is Dustin Pond, something over a quarter of a mile.

"Q. What acts of ownership have you and Ellen Jackson and King and Anderson, and Joe Williams ex-

ercised over this particular land where the timber was cut, during the past ten or twelve years between Pecan Lake and Dustin Pond, where you saw this timber was cut, what acts of ownership have you done; what have you done to them?

"A. What I have done with that land?

"Q. Yes.

"A. The timber?

"Q. Yes.

"A. Been cutting it and using it from over there.

"Q. What have you done with reference to selling any?

"A. May have sold some of it from over there.

"Q. Who did you sell it to?

"A. Sold to Mr. Leavenworth....good many years ago.

This witness further testified he sold timber to Mr. Hull ten or twelve years ago. (R. 26).

Mr. Hill, the surveyor, ran out the lines of the land here claimed. (R. 27).

This is in direct contradiction to the testimony of plaintiff in error, that no timber had at any time been cut by other persons. Furthermore, under the well settled rule where land is in a swamp, so that actual possession cannot be had, and the timber, as here, constitutes the sole value, that the use of the "timber constitutes adverse possession of the locus in quo.

McCaughan v. Young, 85 Miss., 294.

There is a direct and palpable conflict in the evidence upon all of these points, and the burden of proof upon the plaintiff in error, with confidence, we submit, was ample proof of such possession as would constitute adverse possession.

It will be noted that as to land of this character, that when the only use of which it is capable is the en-

joyment of the timber, that a life tenant may, without being guilty of waste, cut the timber. Thus making the cutting of the timber, substantially, equivalent to the use of the land.

See **Balentine v. Poyner**, 2 Hay. 110; **McCauley v. Land Co.**, 2nd Rob. Va., 57; **Campbell v. Clark**, 2 Dancy (Mich.), 143.

Counsel states: "The testimony, on the contrary, shows the lands in question were in the possession of plaintiff in error, and that no claims were made by others until the trespasses involved in this case occurred. (R. 49, 53 and 121).

It is true that this testimony is there and supports counsel's statement, but it is directly contradicted by that for the defendants in error hereinbefore noted, that they claimed and owned the land in question, and therefore, that question having been solved by the jury, of necessity, counsel's contention cannot here be sustained.

Furthermore, it appears that counsel claims, not only the land where he avers the old Mississippi bed was, but, also, where there is now Horseshoe Lake or old river, and that there is controversy and conflict further on.

We admit, that under the decision of this Court in Arkansas v. Tennessee, that the contention that the line is equi-distant between the physical banks, under all circumstances, is overruled, but, in the instant case, such decision does not, with deference, conflict with the possession for which we contend, because plaintiff in error has wholly failed to locate said navigable thread of the stream, which navigable thread of the stream is wholly immaterial, as hereinbefore pointed out; because plaintiff's in error right never came nearer than a half mile, and, even, as hereinbefore stated, if it were found that this land were in Arkansas, that would not in any way determine the case for plaintiff in error, but would only sub-

ject defendants in error to a liability for cutting this timber, to the State of Arkansas.

Wherefore we respectfully submit that this writ of error should be dismissed for the reasons set forth in both the original and supplemental briefs upon this point, and if not, then that it should be affirmed because—

(1) The burden of proof was upon the plaintiff in error to show title to the timber in question and therein it failed.

(a) As it showed no title below the high water mark upon the Arkansas shore.

(b) It failed wholly to show the thread of the navigable stream at the date of the avulsion, and in the absence of such showing, the presumption is that it was equidistant from the fixed banks.

(2) The Supreme Court of the State of Mississippi did not pass upon a Federal question but determined this case upon the broad principles of local law, with reference to

(a) Adverse possession,

(b) Estoppel by asking and obtaining similar instructions,

(c) Failure to show title based upon payment of taxes.

All of which are purely local questions and ample to sustain this decision.

Damages are asked at 10 per cent.

Respectfully submitted,

Marvellus Green .....

Gerald Fitz Gerald .....

George F. Maynard .....

James Green .....

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